

VZCZCXRO8690
RR RUEH DU RUEHMR RUEHPA RUEHRN RUEHTRO
DE RUEHSA #2641/01 3391713
ZNY CCCCC ZZH
R 041713Z DEC 08
FM AMEMBASSY PRETORIA
TO RUEHC/SECSTATE WASHDC 6637
INFO RUEHZO/AFRICAN UNION COLLECTIVE
RUEHTN/AMCONSUL CAPE TOWN 6342
RUEH DU/AMCONSUL DURBAN 0475
RUEHSA/AMCONSUL JOHANNESBURG 8691
RHEHNSC/NSC WASHDC
RHEFDIA/DIA WASHINGTON DC
RUEAIIA/CIA WASHINGTON DC

C O N F I D E N T I A L SECTION 01 OF 02 PRETORIA 002641

SIPDIS

AF/S PLEASE PASS TO A/S FRAZER

E.O. 12958: DECL: 12/04/2018

TAGS: [KJUS](#) [PGOV](#) [KDEM](#) [SF](#)

SUBJECT: WHY CALLS FOR AN ARMS INQUIRY MAY GO UNHEARD

PRETORIA 00002641 001.2 OF 002

Classified By: DEPUTY POLITICAL COUNSELOR MADELINE Q. SEIDENSTRICKER FOR REASONS 1.4 (B) AND (D).

Summary

¶1. (C) Nobel laureates Desmond Tutu and FW de Klerk on December 2 delivered a letter to President Kgalema Motlanthe asking the South African leader to institute an independent and public judicial commission of inquiry into the controversial 1998 arms deal. Their decision to present a letter follows a move in September by Independent Democrats leader Patricia de Lille to call for a commission of inquiry; she called Motlanthe and Congress of the People (COPE) leader Mosiuoa Lekota to take a stand on the decision on December 4. Political analysts and legal scholars say the President is unlikely to appoint such a commission, and the Constitutional Court is unlikely to press Motlanthe into appointing such a commission, because of legal reasons and the risk of uncovering scandalous information. End Summary.

The Argument for a Commission

¶2. (C) The argument that the President is responsible for appointing a commission rests on a clause in section 82 of the South African Constitution. The clause says that the "President is responsible for ... appointing commissions of inquiry." Also, section 83 of the document states that the President "must uphold, defend and respect the Constitution as the supreme law of the Republic." These sections suggest the President has a duty to take steps to uphold the founding values of the Constitution by any means, including the formation of commissions of inquiry. (Note: Section 83 also is the same section used by detractors of former President Thabo Mbeki in calling for his dismissal and by Mbeki himself when he appealed the ruling made by Pietermaritzburg High Court Judge Chris Nicholson's ruling. End Note.) The argument from Tutu and de Klerk is that given the widespread allegations of corruption in the arms deal, the President has a constitutional duty to appoint a full commission of inquiry to ensure accountable, responsive, and open government. Should the President fail to ensure this, they assert that he would be failing in his duty to uphold, defend, and respect the Constitution. Under this line of argument, it follows then that the Constitutional Court could step in and order him to uphold, defend, and respect the Constitution by appointing a commission of inquiry.

Why a Commission Appears Unlikely

13. (C) Political analysts such as University of South Africa professor Dirk Kotze, Witwatersrand University professor Daryl Glaser, and University of Johannesburg professor Albert Venter have all noted in meetings with Poloff that Motlanthe is unlikely to call for the establishment of a commission because of what such a body would find. Moreover, they argue that the African National Congress (ANC) would not want to turn over roughly 10 years of financial records during court proceedings. University of Western Cape law professor Pierre de Vos has said, "While Thabo Mbeki's lawyers immediately sprang into action after the Nicholson judgment in effect found that he had interfered with the NPA (National Prosecuting Authority), he has not sued the Sunday Times for alleging that a bribe of R30 million was solicited from a Qalleging that a bribe of R30 million was solicited from a successful arms bidder and that R2 million was given to Jacob Zuma and the rest channeled to the ANC." De Vos has gone further to note, "Come to think of it, neither has Zuma sued anyone for this scandalous allegation -- despite the fact that he has taken action to sue a cartoonist and some newspaper editors for making fun of him." He believes in a defamation case the ANC would be requested to provide information about their finances and this information would provide embarrassing details or even incriminate them. (Note: Even COPE leader Mosiuoa Lekota, who was ANC chairman during the initial investigation of the arms deal, has remained largely silent on the possibility of an inquiry, possibly for the same reason that such a body would uncover damaging information. End Note.)

PRETORIA 00002641 002.2 OF 002

14. (C) De Vos argues that the Constitutional Court is unlikely to intervene in whether Motlanthe establishes a commission. He says whether the Court would intervene depends on if a presidential decision was deemed "irrational." The Court would have to prove that Motlanthe was making an arbitrary, capricious decision in bad faith in order to step in. Such a case would be difficult to prove, given the many policy options open to Motlanthe to fulfill his constitutional duty of upholding and defending the Constitution. Nicholson did suggest that the sitting President should institute an arms commission, but de Vos says "these (Nicholson's) kinds of mutterings would never have been made by the Constitutional Court. The latter court is far too aware of its appropriate role in our system of constitutional democracy based at least partly on the principle of the separation of powers."

Comment

15. (C) Calls for commission of inquiry into the controversial 1998 arms deal from Tutu or de Klerk are unlikely to go anywhere ahead of the election next year for fear such a body would uncover numerous skeletons from the past and because Motlanthe and the Constitutional Court appear unwilling to get involved. With an inquiry, the ANC risks opening its past for all the world to see. Without an inquiry, the ANC -- but especially Zuma -- will continue to have a cloud of suspicion hanging over its head. A cloud of suspicion from the arms deal appears the likely outcome at this point, but since the scandal broke nearly 10 years ago the ANC has lived with unanswered questions.
BOST